IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 237 of 2002
With
CIVIL APPLICATION NO.2035 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DUNLOP INDIA LIMITED
Versus
KALIDAS PATEL FAMILY TRUST

Appearance:
1. Civil Revision Application No. 237 of 2002
MR MEHUL S SHAH for Petitioner No. 1
MR MIHIR H JOSHI for Respondent No. 1-5

CORAM : MR.JUSTICE D.K.TRIVEDI

Date of decision: 17th/06/2002

CAV COMMON JUDGEMENT

1. The petitioner - original appellant - defendant tenant has challenged the order passed by the Appellate Bench of the Small Causes Court dated 25.2.2002 passed below Exh.1 in Civil Appeal No.44/2002 (Application for

condoning delay) on several grounds and when the matter was placed before my brother Justice S.D.Dave on 27.2.2002,the court has passed the following order and the petitioner herein was directed to deposit the cost of Rs.7,500/-- in the court on or before 21.3.2002:

"Rule returnable on 21.3.2002.Interim relief in terms of para 7(b) till then. This order be communicated to the Small Causes Court, Ahmedabad telegraphically at the cost of the petitioner today."

2. Though Rule was made returnable on 21.3.2002 and interim relief was granted till then, thereafter the matter was adjourned for a subsequent date and the interim relief was ordered to continue. In view of the interim relief passed by this court, the respondents original plaintiffs had preferred Civil Application being Civil Application No.2035 of 2002, wherein he applicants had prayed that necessary direction be given to the Bailiff of the Small Causes Court to formally hand over the possession of the Suit premises to the plaintiffs since the possession thereof had already been taken over from the tenant as highlighted in the Application and in the alternative the applicants had prayed for vacating of the ad interim relief granted earlier i.e.on 27.2.2002.The said Application was placed before my brother Justice S.D.Dave on 8.3.2002 and the said application was adjourned to 16.3.2002. Thereafter, the matter was placed before me after the assignment was changed and considering that in the main matter rule was made returnable on 21.3.2002,by consent of the counsel appearing in the matter, I had kept the Civil Application for hearing with the main Revision Application and accordingly the matter was heard earlier on 26.3.2002 during which I was taken through the order under challenge and the other relevant documents attached to the application and the affidavit filed by the respondent plaintiff praying for vacating of the relief. Mr.Mehul Shah, learned advocate appearing on behalf of the petitioner - appellant - original tenant,has vehemently urged that the Appellate Bench of the Small Causes Court was not right in not accepting the cause for delay when sufficient cause was shown for condoning the delay in filing the Appeal and the Appellate Bench of the Small Causes Court has rejected the Application Exh.1 for condonation of delay in filing the Appeal filed by the petitioner - appellate - original tenant, when the petitioner has challenged the judgment and decree passed by the learned Judge of the Small Causes Court dated 12.10.2001, wherein the learned trial Judge has decreed the Suit of the respondents - plaintiffs for possession.

It is the submission of Mr.Shah that the Appellate Bench of the Small Causes Court ought to have condoned the delay when the petitioner had while filing the Application for condonation of delay shown sufficient cause and further that the petitioner - defendant has fair chance of success in the Appeal filed before the Appellate Bench, wherein the petitioner- defendant has challenged the decree of eviction passed in favour of the plaintiffs. It is his submission that the Appellate Bench of the Small Causes Court ought to have examined the merits of the Appeal and while rejecting the Application for condonation of delay, without examining the merits of the Appeal, the decree for possession was confirmed with the result that the petitioner's case cannot be examined on merits in view of the dismissal of the Application for condonation of delay. During hearing he has also vehemently urged that the Appellate Bench of the Small Causes Court ought to have imposed costs and ought to have dealt with the Appeal on merits. He accordingly, while relying upon certain decisions of the Apex Court, has prayed that to meet with the ends of justice, opportunity be given to the petitioner defendant in respect of the Appeal filed by it before the Appellate Bench of the Small Causes Court.While arguing the Application filed by the respondents - plaintiffs, he has also vehemently urged that though protection was granted by this court, the respondents - plaintiffs had moved execution application and inspite of the stay of the execution of the decree, an attempt is made to dispossess the petitioner from the suit premises. In support of his submission he has placed reliance upon the reply affidavit filed by Shri Pattanaik dated 16.3.2002 with the documents attached to the said affidavit,namely, the panchanama and the Bailiff's report in respect of the execution proceeding initiated by the respondents plaintiffs. Mr.Shah has also contended that when the Appellate Bench of the Small Causes Court has rejected the Application for condonation of delay, without examining the merits in the Appeal, if this court gives any direction for disposal of the said Appeal, as expeditiously as possible, he will see that the petitioner - defendant will co-operate with the court to enable the Appellate Court to dispose of the Appeal on merits within time bound programme. He has further contended that the petitioner-defendant will abide by whichever condition imposed by this court and further that the amount deposited by the petitioner, as directed by this court while issuing Rule, be permitted to be withdrawn by the respondents- plaintiffs by way of costs. He accordingly submitted that the order passed by the Appellate Bench of the Small Causes Court below

Application Exh.1 in Civil Appeal be set aside. Mr. Shah has placed reliance upon the decision of the Apex court in the matter of N. Balakrishnan v. M. Krishnamurthy, reported in (1998) 7 SCC 123. I the said case, the Supreme court has examined the provisions of Section of 5 of the Limitation Act, 1963 and gave guidelines for the court while examining the Application for delay and also explained how to construe "sufficient cause" . As found from the said decision, the Apex Court has in term observed that length of delay is not relevant. However, the court has also to keep in mind the consequent litigation expenses to be incurred by the opposite party and to compensate him accordingly. It is necessary for me to refer to couple of paragraphs of the said judgment, namely, paragraphs 9 and 13. Paragraph 9 is reproduced as under:

"9.It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

Paragraph 13 is reproduced as under:-

"13.It must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time, then the court should lean against acceptance of the explanation. While

condoning the delay, the court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred quite large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant, the court shall compensate the opposite party for his loss."

The Apex Court has also in the matter of Ram Nath Sao v. Gobardhan Sao, reported in 2002 (2) SCALE 334 examined the provisions of Sec.5 of the Limitation Act,1963 as well as Order 22 Rule 9 of the C.P.C. and examined the requirement of "sufficient cause". In the said decision, the Apex court has also considered various decisions as well as decision in the matter of N. Balakrishnan v. M.Krishnamurthy (Supra) and in light of the discussion,the Supreme Court has observed in paragraphs 12 and 13 as under:-

"12.Thus, it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to

strike a balance between resultant effect of the order it is going to pass upon the parties either way.

13.In view of the foregoing discussions, we are clearly of the opinion that on the facts of present case, Division Bench of the High Court was not justified in upholding order passed by the learned Single Judge whereby prayers for condonation of delay and setting aside abatement were refused and accordingly the delay in filing the petition for setting aside abatement is condoned, abatement is set aside and prayer for substitution is granted."

3. Mr. Mihir Joshi appearing for the respondents plaintiffs has vehemently urged that when the Appellate Bench of the Small Causes Court has held that "no sufficient" cause is shown for delay,this court will not exercise its revisional jurisdiction by setting aside the order passed by the Appellate Bench by holding that "sufficient cause" is shown for delay. He has also taken me through the Judgment wherein the Appellate Bench has while rejecting the Application for delay given cogent reason for not accepting the cause for condonation of delay. He has also taken me through the Application with the order passed below Exh.18 in H.R.P. Suit No.6/99 dated 29.10.99 filed by the petitioner defendant wherein the petitioner has moved the learned trial Judge praying for stay of the Suit on the ground that the defendant is declared as a sick company under Sick Industrial Companies (Special Provisions) Act, 1985 and the same is registered under the BIFR and prayed that the Suit be stayed as per the provisions of Sec.22 of the Sick Industrial Companies Act, 1985 and the learned trial Judge has while dealing with the said application, rejected the said Application as back as on 29.10.99. He has also taken me through the Application (Exh.15) filed by the petitioner for stay of proceedings in Darkhast No.193/2001 dated 7.2.2001 and the order passed by the learned Judge of the Small Causes Court dated 14.2.2002, wherein the learned Judge has stayed the further proceedings of Darkhast till 28.2.2002 by observing that the defendant shall prefer Appeal and obtain suitable order from the Appellate court in respect of further proceedings of Darkhast under Section 22(1) of the Sick Industrial Companies Act, 1985. Mr. Joshi has also vehemently urged that once the decree is passed,an attempt is made by the petitioner defendant to delay the proceedings and while referring me to paragraph 2 of the Application, he has highlighted that while filing the Revision Application, the petitioner tenant has suppressed material facts. As found from the details

furnished in the said Application, the plaintiffs landlords have issued notice as contemplated under Section 12(2) of the Bombay Rent Act terminating the tenancy on 14.10.98, which was duly served to the petitioner - defendant at Calcutta and the plaintiffs have instituted a Suit in the Small Causes Court praying for recovery of possession of the suit premises as well as praying for arrears of rent and mesne profit on 1.1.99. In the said proceedings, Application was filed by the defendant for stay of the proceedings on the ground that the defendant is registered under the Sick Industrial Companies Act, 1985 on 9.8.99 and the said Application was rejected by the Court on 20.10.99 and the said order was not challenged. Accordingly the defendant has filed written statement in the said suit on 15.12.99. The plaintiffs had filed Application under Section 11(4) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act,1947 praying for seeking direction regarding the deposit of rent, mesne profit and municipal taxes. The said Application was allowed after considering the reply filed by the defendant as per order dated 22.1.2001 and the court has directed the defendant to deposit arrears of rent and mesne profit amounting to Rs.7,27,650/-- by granting two months time.Inspite of granting time, the defendant has not paid the said amount. Thereafter, plaintiffs have filed application before the trial court on 27.3.2001 for taking order striking off the defence of the defendant for not complying with the order. The trial court has decreed the suit of the plaintiffs on 12.10.2001 and directed for handing over the vacant and peaceful possession by granting time upto 12.12.2001 and further the defendant was directed to pay arrears of rent as well as mesne profit. I am not referring to the further details which were furnished in the application as it is found that even the execution proceedings were proceeded. Mr. Mihir Joshi has also placed reliance upon various judgments on the contention that this court will not interfere with the order under challenge while exercising my revisional jurisdiction. He has placed reliance upon the decision in the matter of M.L.& B. Corporation v. Bhutnath, reported in AIR 1964 SC 1336 wherein the Supreme court has observed as under:

"The proposition that an erroneous decision on a question of limitation involves the question of jurisdiction applies to cases in which the law definitely ousts the jurisdiction of the Court to try a certain dispute between the parties and not to cases in which there is no such ouster of jurisdiction under the provisions of any law, but where it is left to the Court

itself to determine certain matters as a result of which determination the Court has to pass a certain order and may, if necessary, proceed to decide the dispute between the parties. The distinction between the two classes of cases is that in one, the Court decides a question of law pertaining to jurisdiction. In the other, it decides a question within its jurisdiction."

In the matter of Samir Kumar Dey v. Sova Ray, reported in AIR 1995 Orissa 242, in paragraph 7 the Court has observed as under:-

"This court has the power to exercise revisional jurisdiction only if the subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity. As observed by the apex Court in M/s. D.L.F. Housing and Construction Co.(P.) Ltd. v. Sarup Singh, AIR 1971 SC 2324 : (1970) 2 SCR 388 the position is firmly established that while exercising the jurisdiction under Section 115 of the Code, it is not competent to the High Court to correct errors of fact, however, gross or even errors of law unless the said errors have relation to the jurisdiction of the Court to try the dispute itself. The words "illegally and with material irregularity," as used in clause (c) also do not cover either errors of fact or of law, they do not refer to the decision arrived at but merely to the manner in which it is reached. The errors contemplated by this clause may relate either to breach of some provision of law or to material defects of procedure affecting the ultimate decision, and not to errors either of fact or of law, after the prescribed formalities have been complied with. While in a first appeal the Court is free to decide all questions of law and fact which arise in the case, in the exercise of revisional jurisdiction, the High Court is not entitled to re-examine or re-assess the evidence on record and substitute its own findings on facts for those of the subordinate Court. The jurisdiction of the Court under Section 115 of the Code is a limited one. It does not encompass conclusions of law or fact in which the question of jurisdiction is not involved. In non-condonation of delay, there was no jurisdictional defect or error in the findings of the lower appellate Court so as to entitle this Court to interfere under Section 115 of the Code."

4. In light of the above decisions Mr. Joshi appearing for the respondents plaintiffs has vehemently

urged that this court will not entertain this Revision Application while exercising my revisional jurisdiction under Sec.115 of the C.P.C. as according to Mr. Joshi in light of the facts highlighted, no sufficient cause is shown for condoning the delay and further that inspite of the direction for depositing the arrears amount of rent and mesne profit as well as the Municipal taxes, the petitioner tenant has not deposited the same and prayed for dismissal of the Revision Application.

5. While disposing of this Revision Application, I am not referring to certain decisions cited by the counsel appearing for the parties and I am also not examining the contentions raised before me in respect of the merits and de-merits of the decree in view of the fact that the Appellate Bench of the Small Causes Court has rejected the Application for condonation of delay in filing the Appeal. As found from the order under challenge, the Suit filed by the landlord was decreed on 12.10.2001 and the execution proceedings were initiated by filing Darkhast on 14.12.2001. Certified copies were applied for by the defendant - tenant on 4.2.2002 and the same were received on 6.2.2002 and the Appeal was presented with the Application Exh.1 before the Appellate Bench of the Small Causes Court on 14.2.2002. The said Appeal was filed beyond the period of limitation by 93 days and it is the case of the petitioner - defendant that he has been bonafide prosecuting the matter further. It is not in dispute that there is a delay in filing the Appeal and for which the Application for condonation of delay was submitted on the ground that sufficient cause is shown for such delay, supported with an affidavit. The Appeal alongwith the Application for condonation of delay was presented before the Appellate Court on 14.2.2002. As observed earlier, the executing Court has while deciding the Application Exh.15 in Darkhast No.193/2001 filed by the defendant - tenant rejected the same on 14.2.2002 and the executing Court while rejecting the Application has stayed the further proceedings of the Darkhast till 28.2.2002 by observing that suitable order be obtained from the Appellate Court in respect of stay of the proceedings and immediately on the very day, the petitioner defendant had filed Appeal before the Appellate Court. Considering the order, it transpires that at the time when the Application for condonation of delay was submitted, prior thereto, rightly or wrongly, the proceedings were initiated by the petitioner, which were pending before the concerned Court, even before the executing court, where the petitioner tenant has prayed for stay of the execution of the decree and the Application Exh.15 was rejected by the executing court on

14.2.2002 and the Darkhast was stayed further till 28.2.2002.

6. In light of the various decisions, while examining the Application for condonation of delay, the Court should take liberal view. I have already referred to the decision of the Apex court in the matter of N. Balakrishnan v. M.Krishnamurthy (Supra). The Appellate Bench of the Small Causes Court has while rejecting the Application and without discussing further, observed that the petitioner - defendant had, while filing the application, some malafide intention. It is difficult for this court to accept the expression made by the Appellate Court regarding malafide intention. When the parties had approached the court for seeking any relief, the aggrieved party had all right to challenge the proceedings further before the Appellate Court or before the appropriate forum. By filing Application,one cannot presume that he had approached with some malafide intention. In my view, in the present case the decree was passed in favour of the landlord in a Suit filed in the year 1999 and during the pendency of the Suit,the petitioner defendant had moved the court for stay of the proceedings relying upon the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 and the said application was rejected by the Court. The decree was passed in favour of the landlord on 12.10.2001 and when the execution application was moved by the plaintiffs, the petitioner - defendant had appeared before the executing court and prayed for time to file objection and ultimately, as observed earlier, the executing court has rejected the Application Exh.15 as per order dated 14.2.2002 and stay of the Darkhast was extended till 28.2.2002 and on the very day the petitioner defendant had presented the Appeal with the application for condonation of delay before the Appellate Court. Accordingly, this court is of the view that in light of the decision of the Apex Court in the matter of N. Balakrishnan v. M.Krishnamurthy (Supra),the delay of 93 days in filing the Appeals deserves to be condoned. However in the interest of justice and in the interest of parties, this Court is of the view that while condoning the delay, it is necessary for this court to give certain directions to the petitioner - defendant. As observed earlier, as back as on 4.2.2002, while deciding the Application filed by the plaintiffs under section 11(4) of the Bombay Rents,Hotel and Lodging House Rates (Control) Act, 1947, the learned trial Judge has directed the petitioner - defendant to deposit the arrears of rent and mesne profit aggregating to Rs.7,27,650/-- by granting two months time as per order dated 22.1.2001 and

even while decreeing the suit on 12.10.2001, the court has directed the petitioner defendant to pay all arrears of rent as well as mesne profit etc, by granting time upto 12.12.2001 and till date the petitioner - defendant has not deposited the said amount. Accordingly while allowing this Revision Application and quashing and setting aside the impugned order, the petitioner defendant is directed to deposit the arrears amount of rent, mesne profit and municipal tax etc. on or before 31.7.2002 with the trial court and on such deposit is being made, the appellate court to examine the Appeal on merits. If the petitioner defendant fails to deposit the aforesaid amount with the trial court within the time granted by this court, the Application for condonation of delay deserves to be rejected. The learned counsel appearing in the matter have also agreed that they will co-operate with the Court to enable the court to dispose of the Appeal as expeditiously as possible. In view of the above and in view of the fact that the decree for possession was passed in favour of the plaintiffs as back as on 12.10.2001,it is expected that the Appellate Bench of the Small Causes Court shall hear the Appeal and decide the same in accordance with law as expeditiously as possible, however not later than 30.11.2002. The respondents-plaintiffs are also entitled to withdraw a sum of Rs.7500/-- deposited by way of cost by the petitioner. Rule is accordingly made absolute in the above terms with costs. Stay of possession to continue till the Appellate Bench of the Small Causes Court disposes of the Appeal on merits. However, if the amount, as per the order, is not deposited,the stay will stand automatically vacated.

In view of the order passed in the main Revision Application, no orders are required to be passed in Civil Application No.2035/2002 and the same stands disposed of accordingly with no order as to costs.

(D.K.Trivedi,J)

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